



Kentucky Law Journal

Volume 107 | Issue 4

Article 7

2019

Calling a Spade, a Spade: Infirmities Facing Bump Stock Regulation Under the National Firearms Act

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Recommended Citation

Gilbert, William Tyler (2019) "Calling a Spade, a Spade: Infirmities Facing Bump Stock Regulation Under the National Firearms Act," *Kentucky Law Journal*: Vol. 107 : Iss. 4 , Article 7.
Available at: <https://uknowledge.uky.edu/klj/vol107/iss4/7>

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NOTES

CALLING A SPADE, A SPADE: INFIRMITIES FACING BUMP STOCK REGULATION UNDER THE NATIONAL FIREARMS ACT

William Tyler Gilbert¹

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On October 1, 2017, a gunman in Las Vegas fired thousands of rounds of ammunition from the 32nd floor of Mandalay Bay Resort and Casino upon a defenseless crowd of outdoor concert attendees.² The attack lasted for nearly eleven minutes; killing fifty-eight and wounding hundreds.³ Among the dozens of weapons recovered at the shooter's position of attack were AR-15 rifles equipped with after-market bump stock attachments that enabled the semi-automatic rifles to replicate automatic fire at a rate of approximately four hundred rounds per minute.⁴ At the time of the mass shooting, there were numerous variations of these attachments available for purchase on the web and in retail stores.⁵

The bump stock's market entry stemmed from decades of advancements in weapons technology juxtaposed with outdated legislation aimed at curtailing the use and ownership of a twentieth-century percipience of a "machinegun."⁶ In a 2010 letter responding to a bump stock variant manufacturer's request for a classification of its product, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") declared that the bump stock was not regulated under federal law because the attachment did not convert a non-regulated semi-automatic weapon into a regulated "machinegun," as defined by the National Firearms Act of 1934 ("NFA").⁷ Following the ATF's controversial classification, the firearms industry surged with devices aimed to circumvent antiquated federal firearms laws.⁸

Despite the 2010 ATF determination, Congress neither amended the NFA nor enacted legislation to effectively ban the sale of bump stocks in interstate commerce prior to the Las Vegas shooting.⁹ Critics of congressional inaction blame a stymied partisan effort to block the introduction of any firearm legislation in the face of

² Euan McKirdy, *What Happened Inside the Shooter's Suite at the Mandalay Bay Hotel*, CNN (Oct. 4, 2017, 5:15 AM), <http://www.cnn.com/2017/10/03/us/mandalay-bay-hotel-room-what-we-know/index.html> [https://perma.cc/PE7Q-APME].

³ Kieran Corcoran, *This Timeline Shows Exactly How the Las Vegas Massacre Unfolded*, BUSINESS INSIDER (Oct. 10, 2017, 7:40 AM), <https://www.businessinsider.com/timeline-shows-exactly-how-the-las-vegas-massacre-unfolded-2017-10> [https://perma.cc/UVW9-UYFA]; McKirdy, *supra* note 2.

⁴ Ed Leefeldt, *Stephen Paddock Used a "Bump Stock" to Make His Guns Even Deadlier*, CBS NEWS (Oct. 4, 2017, 5:55 PM), <https://www.cbsnews.com/news/bump-fire-stock-ar-15-stephen-paddock-guns-deadlier/> [https://perma.cc/DN59-MT5R].

⁵ See, e.g., BUMP-FIRE SYSTEMS, <http://www.bumpfiresystems.com> [https://perma.cc/Y6B9-JN32]; SLIDE-FIRE, <http://www.slidefire.com> [https://perma.cc/6WA6-SGYP].

⁶ See 26 U.S.C. § 5845(b) (2012) (codifying the definition of "machinegun").

⁷ Letter from John R. Spencer, Chief, Firearms Technology Branch, ATF, to Slide Fire (June 7, 2010), [hereinafter "Slide Fire Letter"], <http://www.slidefire.com/files/BATFE.pdf> [perma.cc/X4HG-DmKW]; see also 26 U.S.C. § 5845(b) (2012) (defining "machinegun").

⁸ See, e.g., *BMF Trigger Activator*, GALATI INTERNATIONAL, <https://www.galatiinternational.com/bmf-trigger-activator-1022-fire-rifle-rapid-fire-crank.html> [https://perma.cc/E7HH-WXKU]; Tiffany Hsu, *Bump Stock Innovator Inspired by People Who "Love Full Auto"*, NY TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/business/bump-stock-innovator.html> (noting that sales of bump stocks manufactured by Slide Fire Solutions exceeded 35,000 units in the first year).

⁹ See Andrew O'Reilly, *Trump Administration Moves to Ban Sale of Bump Stocks, Make Possession Illegal by March*, FOX NEWS (Dec. 19, 2018), <https://www.foxnews.com/politics/trump-administration-moves-to-ban-sale-bump-stocks-makes-them-illegal-to-possess-by-march> [https://perma.cc/R38H-8ND7].

potential backlash from the National Rifle Association.¹⁰ Following the Las Vegas attack, some members of Congress proposed a bill to effectively amend the NFA to include bump stocks as regulated “firearms.”¹¹ The bill required bump stock owners to “register [the] device with the Secretary of the Treasury and include . . . the information required” under section 26 U.S.C. § 5841(a).¹² The bill was met with immediate reluctance as some members of Congress shifted responsibility and called on the ATF to review its 2010 determination that the bump stock attachment complied with federal law.¹³

In December of 2017, the ATF took preliminary steps to regulate bump stocks under the NFA by publishing an Advanced Notice of Proposed Rulemaking (ANPRM) in order to seek public input about the practicality of a broadened interpretation of the term “machinegun.”¹⁴ Three months later, the Department of Justice submitted a notice of a proposed regulation to the Office of Management and Budget “to clarify that the definition of ‘machinegun’ in the National Firearms Act and Gun Control Act includes bump stock type devices.”¹⁵ “On December 18, 2018, Acting Attorney General Matthew Whitaker announced that the Department of Justice ha[d] amended the regulations” of the ATF in order to formally classify bump stocks as illicit “machineguns.”¹⁶ Hours after the announcement, Gun Owners of America indicated that it would initiate a lawsuit against the ATF.¹⁷ Because the most recent bump stock classification is glaringly inconsistent with the federal statutory definition of a “machinegun,” it remains unclear as to whether the ATF’s final rule will survive a legal challenge.

This Note advocates that Congress, rather than an executive agency, should take action in order to effectively impose nationwide bump stock regulations. The federal machinegun laws were enacted at a time when innovative weapons attachments such as bump stocks were non-existent.¹⁸ Furthermore, the legislative history of the NFA

¹⁰ See Polly Mosendz, *Bump Stocks Shouldn't Be Regulated, Public Tells ATF*, BLOOMBERG POLITICS (Feb. 8, 2018, 5:00 AM), <https://www.bloomberg.com/news/articles/2018-02-08/bump-stocks-shouldn-t-be-regulated-public-tells-atf>.

¹¹ See Closing the Bump-Stock Loophole Act, H.R. 4168, 115th Cong. (2017).

¹² *Id.*

¹³ Rebecca Shabad, *Paul Ryan on Bump Stocks: “A Regulatory Fix is the Smartest, Quickest Fix,”* CBS NEWS (Oct. 11, 2017, 11:20 AM), <https://www.cbsnews.com/news/paul-ryan-on-bump-stocks-a-regulatory-fix-is-the-smartest-quickest-fix/> [<https://perma.cc/NG3Y-KEUZ>]; see also *NRA’s Wayne LaPierre and Chris Cox Issue Joint Statement*, NRA, <https://home.nra.org/joint-statement> [<https://perma.cc/YGG8-U6RM>].

¹⁴ Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices, 82 Fed. Reg. 60,929 (Dec. 26, 2017) (to be codified at 27 C.F.R. pt. 478).

¹⁵ Press Release, Dep’t of Justice Office of Public Affairs, Department of Justice Submits Notice of Proposed Regulation Banning Bump Stocks (Mar. 10, 2018), <https://www.justice.gov/opa/pr/departmentsubmits-notice-proposed-regulation-banning-bump-stocks> [<https://perma.cc/9N8Q-JM2M>].

¹⁶ *Bump Stocks*, ATF, <https://www.atf.gov/rules-and-regulations/bump-stocks> [<https://perma.cc/W2RZ-UL42>].

¹⁷ Press Release, Gun Owners of America, Gun Owners of America to File Suit Against Arbitrary ATF Bump Stock Ban (Dec. 18, 2018), <https://gunowners.org/gun-owners-of-america-to-file-suit-against-atf-bump-stock-ban.htm> [<https://perma.cc/X4GZ-5LAV>].

¹⁸ Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

indicates that Congress fully considered the ramifications of confining the term “machinegun” to weapons which fire multiple shots with a single pull of the trigger.¹⁹ Because the current “machinegun” definition reflects Congress’s intent to regulate fully-automatic weapons,²⁰ the ATF’s novel construction of the NFA should not be upheld.

This Note does not advocate for a *per se* ban of bump stocks. Rather, it advocates for the imposition of a legislative amendment to the categorical term “firearm,” which would make bump stocks subject to the provisions of the National Firearms Act.²¹ Part I of this Note discusses the current powers afforded to the ATF and provides an analysis of the ATF’s 2010 classification of the bump stock.²² Next, the analysis addresses the alleged authority of the ATF to regulate bump stocks under the current federal firearms statutes and advocates that an overreaching administrative interpretation of the current statutory “machinegun” definition is unlawful. Finally, Part III advocates that Congress should promulgate a new category of NFA-regulated firearms similar to California’s statutorily defined “trigger activating devices”²³ in order to effectively regulate bump stocks.

I. ATF AUTHORITY AND 2010 BUMP STOCK RULING

A. Overview of Federal Firearms Laws

The National Firearms Act²⁴ was enacted in 1934 as an effort to curb prohibition-era gun violence.²⁵ The law levied an excise tax on the manufacture, sale, and transfer of certain categorically defined “firearms.”²⁶ In addition, the Act required owners of regulated “firearms” to register their firearms with the Secretary of the Treasury.²⁷ Initially, the definition of “firearms” included shotguns and rifles having barrels of less than eighteen inches in length, certain firearms described as “any other weapons,” machineguns, and firearm mufflers and silencers.²⁸ In 1968, Congress expanded the category of NFA-regulated firearms by adding “destructive

¹⁹ See *National Firearms Act of 1934: Hearing on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 35 (1934) (statement of Karl T. Frederick, President, National Rifle Association).

²⁰ See 26 U.S.C. § 5845(b) (2012) (defining “machinegun” under the National Firearms Act).

²¹ See 26 U.S.C. § 5811(a) (2012) (imposing a \$200 tax on the transfer of machineguns, among other NFA weapons).

²² See Slide Fire Letter, *supra* note 7.

²³ See CAL. PENAL CODE § 16930 (West 2019) (defining trigger activating devices).

²⁴ National Firearms Act of 1934, Pub. L. No. 73-474, § 1, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5801 et seq. (2012)).

²⁵ James A. D’Cruz, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 HARV. J.L. & PUB. POL’Y 493, 496 (2017).

²⁶ See National Firearms Act of 1934, Pub. L. No. 73-474, § 1, 48 Stat. 1236 (1934); see also 26 U.S.C. § 5845(a) (2012) (defining firearms); 27 C.F.R. § 479.11 (2019) (noting the firearms regulated under the NFA).

²⁷ See National Firearms Act of 1934 § 2.

²⁸ *Id.* § 1(a).

devices.”²⁹ Section 12 of the NFA originally granted “[t]he Commissioner [of the Internal Revenue Service], with the approval of the Secretary [of the Treasury], [the authority to] prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.”³⁰ In 2002, Congress transferred the authority to the Director of the ATF in coordination with the Attorney General of the United States.³¹

Following recurring instances of gun violence, Congress took further measures to curb gun violence with the promulgation of the Gun Control Act of 1968 (“GCA”).³² Among other things, the GCA “established a set of requirements designed to allow the chain of commerce for any given firearm to be traced from its manufacture or import through its first sale by a retail dealer.”³³ The GCA established a minimum age for purchasers of firearms, required that all firearms be affixed with a serial number, and expanded the categories of prohibited possessors of firearms.³⁴ However, the GCA did not impose any further registration requirements for firearms that were not categorized under the NFA.³⁵ Accordingly, the vast majority of commonly owned handguns and rifles are currently excluded from the NFA’s ownership restrictions and taxation implications.³⁶

B. Powers afforded to the Bureau of Alcohol, Tobacco, Firearms and Explosives

The ATF is largely responsible for the effective administration of federal firearms laws, including the National Firearms Act and the Gun Control Act of 1968.³⁷ Anyone wishing to engage in the activity of importing, manufacturing, or dealing in firearms, or manufacturing or importing ammunition, must first obtain a federal firearms license from the ATF.³⁸ Once a license is issued, the responsibility to fully comply with federal firearms laws and regulations lies with the licensee.³⁹

²⁹ See Gun Control Act of 1968, Pub. L. No. 90-618, § 5845, 82 Stat. 1213, 1231 (1968) (codified at 18 U.S.C. § 921 (2012)).

³⁰ National Firearms Act of 1934 § 12.

³¹ Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111, 116 Stat. 2135, 2274 (2002) (codified at 6 U.S.C. §§ 101–1717 (2012)).

³² See Gun Control Act of 1968 § 101.

³³ Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 CRIME & JUST. 319, 322 (2002).

³⁴ See Gun Control Act of 1968 §§ 922–23, 5842.

³⁵ See *id.* § 5845.

³⁶ See 26 U.S.C. § 5845(a) (2012); Lee Ford-Tritt, *Dispatches From the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. COLLOQUY 154, 159. (“Title I firearms primarily include, but are not limited to, rifles, shotguns, and handguns --the vast majority of firearms owned in America. These weapons can be single shot, bolt action, and even semiautomatic. Title I firearms are not generally regulated by the federal government and so they do not require the NFA transfer tax or application process.”); Smith, *supra* note 61 at 230 (noting that the majority of firearms in circulation, such as handguns, rifles, and shotguns, are not Title II firearms).

³⁷ *Fact Sheet—National Firearms Act (NFA) Division*, ATF, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-national-firearms-act-nfa-division> [<https://perma.cc/P3DV-LT8A>]; *Gun Control Act*, ATF, <https://www.atf.gov/rules-and-regulations/gun-control-act> [<https://perma.cc/QYK3-WD2R>].

³⁸ 18 U.S.C. § 842(a)(1) (2012); 27 C.F.R. § 478.41 (2019).

³⁹ See U.S. DEPT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FEDERAL FIREARMS LICENSEE QUICK REFERENCE AND BEST PRACTICES GUIDE 1–2 (2005),

The Firearms and Ammunition Technology Division (“FATD”) of the ATF is “responsible for technical determinations concerning types of firearms approved for importation into the United States and for rendering opinions regarding the classification of suspected illegal firearms and newly designed firearms.”⁴⁰ From time to time, the “ATF publishes [FATD] rulings [on its website] to promote uniform application of the laws and regulations it administers.”⁴¹ “Rulings do not have the force and effect of Department of Justice regulations, but they may be used as precedents” until they are subsequently overruled.⁴² In addition to public rulings, the ATF submits private classification letters or “letter rulings,” as a means to make specific decisions concerning the legality of firearms and ammunition.⁴³ Although firearms manufacturers are not required by law to obtain letter rulings, the ATF encourages manufacturers to seek an agency classification before producing firearms.⁴⁴

Letter rulings are only available upon request and are generally based on previous rulings, court decisions, the GCA, and the NFA.⁴⁵ The agency’s letter rulings “may generally be relied upon by their recipients as the agency’s official position concerning the status of the firearms under Federal firearms laws.”⁴⁶ However, the ATF does not generally release these letters to the public.⁴⁷ Therefore, it is difficult for third-party gun manufacturers, designers, and dealers to make informed judgments about the agency’s evolving legal interpretations of the NFA or GCA.⁴⁸

C. “Machineguns” under the NFA

As mentioned previously, the NFA imposes owner registration and tax requirements on certain categories of firearms.⁴⁹ Currently, “machineguns” fall within the auspices of the NFA as a category of firearms.⁵⁰ A “machinegun” is statutorily defined as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual

<https://www.jefferson-texas.com/wp-content/uploads/2013/12/ATF-FFL-Quick-Reference-and-Best-Practices-Guide1.pdf> [<https://perma.cc/CWN9-FUPX>].

⁴⁰ *Firearms and Ammunition Technology*, ATF, <https://www.atf.gov/firearms/firearms-and-ammunition-technology> [<https://perma.cc/GJ2P-CVZK>].

⁴¹ *Rulings*, ATF, <https://www.atf.gov/rules-and-regulations/rulings> [<https://perma.cc/NXD8-6WKS>].

⁴² *Id.*

⁴³ See 27 C.F.R. § 70.471 (2019).

⁴⁴ U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF NATIONAL FIREARMS ACT HANDBOOK 42 (2009), <https://www.atf.gov/firearms/docs/atf-national-firearms-act-handbook-chapter-7/download> [<https://perma.cc/L73D-KEKJ>].

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ Ted Bromund, *Why is the ATF Making Secret Rules for the Firearms Industry?*, FORBES (Mar. 24, 2019, 4:47 PM), <https://www.forbes.com/sites/tedbromund/2019/03/24/why-is-the-atf-making-secret-rules-for-the-firearms-industry/#6ac2d22e526d> [<https://perma.cc/Z6UJ-WWT2>].

⁴⁸ See ATF NATIONAL FIREARMS ACT HANDBOOK, *supra* note 44, at 42.

⁴⁹ See 26 U.S.C. § 5811(a) (2012) (codifying the tax implications of transferring a firearm under the National Firearms Act); *id.* § 5841 (imposing registration requirements on certain firearms).

⁵⁰ 26 U.S.C. § 5845(a) (2012) (including machineguns in the NFA’s definition of a firearm).

reloading, *by a single function of the trigger*.”⁵¹ From a plain reading of the statute, a high rate of fire does not conclusively categorize a firearm as a “machinegun.”⁵² Rather, the way in which the weapon fires after the trigger is pulled is determinative.⁵³ Domestic ownership of a machinegun is severely limited. It is currently illegal for any person to transfer or possess a machinegun unless the person lawfully owned the gun prior to the enactment of the Firearm Owners’ Protection Act of 1986.⁵⁴

For machineguns manufactured before May 19, 1986, possession is lawful as long as the tax and registration requirements of the NFA are met.⁵⁵ The NFA imposes a \$200 excise tax on each transfer of a machinegun⁵⁶ and requires all machineguns not in the possession or under the control of the U.S. government to be registered with the treasury department.⁵⁷ An unlicensed individual may, with ATF approval, acquire a machinegun from its lawful owner residing in the same state as the individual.⁵⁸ However, the transferor must first file an ATF application, which includes detailed information on the respective weapon to be transferred.⁵⁹ As of April 2017, there were approximately 630,000 machineguns registered in the National Firearms Act Registry.⁶⁰

The unlawful possession of NFA firearms, whether actual or constructive, comes with “strictly enforced criminal penalties.”⁶¹ An unlawful machinegun possessor may face a fine “of up to \$250,000, up to ten years in prison, and the forfeiture of the weapon and any ‘vessel, vehicle, or aircraft’ used to conceal or convey the firearm.”⁶² In other words, machinegun ownership is illegal unless the ATF has explicitly granted an individual with permission to own the weapon and the weapon was manufactured before May 19, 1986.⁶³

Prior to the ATF’s recent regulation, bump stock owners were not subject to the machinegun ownership restrictions of the Firearm Owners’ Protection Act or the tax

⁵¹ *Id.* § 5845(b) (emphasis added); *see also* 18 U.S.C. § 921(a)(23) (2012) (defining machinegun by referencing to the NFA’s definition).

⁵² 26 U.S.C. § 5845(b) (2012).

⁵³ *Id.*

⁵⁴ Firearm Owners’ Protection Act of 1986, Pub. L. No. 99–308, § 102(9), 100 Stat. 449, 453 (codified at 18 U.S.C. § 922 (2012)).

⁵⁵ *See id.*

⁵⁶ 26 U.S.C. § 5811(a) (2012).

⁵⁷ *Id.* § 5841(a).

⁵⁸ *See* 27 C.F.R. § 478.29 (2019).

⁵⁹ 26 U.S.C. § 5812 (2012); 27 C.F.R. § 479.84 (2018).

⁶⁰ U.S. DEP’T OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES: ANNUAL STATISTICAL UPDATE 15 (2017), <https://www.atf.gov/resource-center/docs/undefined/firearms-commerce-united-states-annual-statistical-update-2017/download> [<https://perma.cc/X6PB-6T7T>].

⁶¹ Taylor Smith, *Rule 41F: Targeting a Gun Trust Loophole*, 9 EST. PLAN. & COMMUNITY PROP. L.J. 327, 331 (2017).

⁶² *Id.* (internal quotations omitted) (quoting Gerry W. Beyer, *Target Best Practices for Guns Included in an Estate*, 43 EST. PLAN. 25, 26 (2016)).

⁶³ *See* 18 U.S.C. § 922(o) (2012).

implications of the NFA.⁶⁴ Among other things, the ATF's final rule "clarifies that the definition of 'machinegun' in the Gun Control Act (GCA) and National Firearms Act (NFA) includes bump-stock-type devices."⁶⁵ The implications are unsettling for bump stock owners and manufacturers alike. Because bump stock variants were not in circulation prior to 1986, bump stock ownership is now effectively banned under the Firearm Owners' Protection Act.⁶⁶ As a result, bump stock owners are required to either destroy the devices or surrender them to the nearest ATF office by March 26, 2019.⁶⁷ Any bump stock possessor thereafter will be subject to the restrictions imposed by the GCA and NFA.⁶⁸ The severity of the ATF's final rule becomes even more unsettling when one becomes familiar with the bump stock's semi-automatic functionality.

D. Bump Firing: A Rapid-fire Technique Advanced by Innovation

Generally speaking, "bump firing" is a technique whereby the shooter uses a semi-automatic weapon's recoil to depress the trigger mechanism and "fire multiple shots in rapid succession."⁶⁹ The technique enables the shooter to fire the weapon at a faster rate than by an unaided pull of the trigger by the shooter's finger alone.⁷⁰ As the trigger is "pulled" by the shooter's finger and the gun discharges, a bullet is propelled forward from the weapon's receiver,⁷¹ and kinetic energy is transferred back toward the shooter under Newtonian principles of equal and opposite reaction.⁷² The empty ammunition cartridge ejects from the weapon in response to the recoil, and a second round of ammunition is self-loaded into the receiver by the weapon's magazine.⁷³ Although the recoil pushes the gun backward after a shot is fired, the shooter can effectively depress the trigger again and fire off another round by applying forward pressure to the weapon and allowing the trigger to collide with the shooter's finger.⁷⁴

"Bump firing" can be performed without the aid of an aftermarket stock. However, the technique is difficult to perfect and the shooter's accuracy is seriously

⁶⁴ See *id.* (codifying the machinegun ownership restrictions of the Gun Control Act); 26 U.S.C. § 5811(a) (2012) (codifying the tax implications of transferring a firearm under the National Firearms Act).

⁶⁵ *Bump Stocks*, *supra* note 16.

⁶⁶ Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,535 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479); see also Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 109(a), 100 Stat. 449, 460 (codified at 18 U.S.C. § 922(o) (2012)).

⁶⁷ Bump-Stock-Type Devices, 83 Fed. Reg. at 66,514, 66,530.

⁶⁸ *Id.* at 66,515.

⁶⁹ *Bump Firing*, SLIDE FIRE, <http://slidefire.com/how-it-works/> [https://perma.cc/7F8Z-N3NP].

⁷⁰ See *id.*

⁷¹ Method of Shooting a Semi-Automatic Firearm, U.S. Patent No. 8,127,658 B1 (filed Oct. 26, 2011) (issued Mar. 6, 2012).

⁷² See D. Arthur Kelsey, *The Laws of Physics & the Physics of Laws*, 25 REGENT U.L. REV. 89, 93 (2012) ("Newton's Third Law of Motion provides that all forces come in opposing pairs. For each action (better thought of as a force) we should expect to see an equal and opposite reaction.").

⁷³ Method of Shooting a Semi-Automatic Firearm, U.S. Patent No. 8,127,658 B1 (filed Oct. 26, 2011) (issued Mar. 6, 2012) (describing the technology of a Slide Fire bump stock in the description of the claim).

⁷⁴ *Id.*

undermined because it is difficult to maintain the weapon against the shooter's shoulder while firing.⁷⁵ An aftermarket bump stock facilitates the rapid firing technique while allowing the weapon to be placed against the shooter's shoulder in a relatively steadier aiming position.⁷⁶ When the weapon is initially fired, the attachment manipulates the weapon's recoil and enables the weapon to slide backward, thereby removing the shooter's finger from the trigger.⁷⁷ If a shooter applies timely forward pressure, the weapon slides forward relative to the shooter's stabilized firing hand and the weapon discharges again when the trigger "bumps" the shooter's finger.⁷⁸ With the attachment of a bump stock, a semi-automatic weapon can simulate automatic rates of fire by multiple functions of the trigger in rapid succession.⁷⁹

In 2010, the ATF declined to categorize a bump fire stock variant as an NFA-regulated firearm in a private letter to Slide Fire Solutions.⁸⁰ Applying the plain language of 26 U.S.C. § 5845, the agency determined that a Slide Fire stock merely modified an unregulated semi-automatic weapon, rather than transforming it into a regulated machinegun.⁸¹ The agency noted that although a semi-automatic weapon's rate of fire could be dramatically increased with the attachment of Slide Fire's device, the weapon maintained the ability to fire only one round of ammunition per function of the trigger.⁸² When using a bump stock, a separate function of the trigger occurs each time the trigger collides with the shooter's finger.⁸³ As such, the ATF declined to categorize the product as a "machinegun" under the NFA or a machinegun conversion device under the GCA.⁸⁴

II. BUMP STOCKS UNDER FIRE: FITTING A SQUARE PEG IN A ROUND HOLE

Almost immediately after the Las Vegas attack, the ATF faced public scrutiny from the NRA and members of Congress for its previous bump stock classification.⁸⁵ As a result, the agency took preliminary measures to regulate bump stocks by submitting an Advanced Notice of Proposed Rulemaking to seek public input about the practical impacts of broadening the interpretation of the statutory term "machinegun."⁸⁶ Shortly thereafter, the Department of Justice submitted "a notice of

⁷⁵ See *id.* (discussing the alternative "bump firing" techniques and their attendant safety and accuracy issues).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,516 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

⁷⁹ See *id.* at 66,546.

⁸⁰ Slide Fire Letter, *supra* note 7.

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*

⁸⁴ *Id.*; see also 18 U.S.C. § 922 (2012) (detailing unlawful acts with respect to certain firearms and related devices); 26 U.S.C. § 5845(b) (2012) (defining "machinegun").

⁸⁵ See Mosendz, *supra* note 10; Shabad, *supra* note 13.

⁸⁶ Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60,929 (Dec. 26, 2017) (to be codified at 27 C.F.R. pts. 478, 479).

a proposed regulation to clarify that the definition of ‘machinegun’ in the National Firearms Act and Gun Control Act includes bump stock type devices, and that federal law accordingly prohibits the possession, sale, or manufacture of such devices.”⁸⁷ Finally, on December 26, 2018, the ATF published a final rule in the Federal Register to effectively ban the ownership of bump stock devices.⁸⁸

Despite the ATF’s promulgation of the “machinegun” regulation, a definitive bump stock ban could take years to finalize. In the days following the announcement of the final rule, the Gun Owners of America sought an injunction to prevent the ban from going forward.⁸⁹ As it stands, it is unclear as to whether a reviewing court will uphold the agency action. The ATF’s final rule significantly alters the longstanding “machinegun” definition by construing the phrase “automatically” to mean “functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger.”⁹⁰ In addition, the phrase “single function of the trigger” now means “a single pull of the trigger and analogous motions.”⁹¹ It is debatable as to whether these additional descriptions add any clarity to the meaning of the federal “machinegun” definition.

Of particular importance, the ATF’s final rule specifically expands the term “machinegun” to encompass “bump-stock-type devices.”⁹² The term “bump-stock-type device” is construed as:

[A] device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.⁹³

By incorporating the term “bump-stock-type device” into the definition of “machinegun,” the final rule broadens the traditional scope and construction of the NFA.⁹⁴ It is incontrovertible that “an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”⁹⁵ Thus, the ATF likely faces an uphill battle in convincing a court that its bump stock regulation is lawful.

⁸⁷ Press Release, Dep’t of Justice Office of Public Affairs, *Department of Justice Submits Notice of Proposed Regulation Banning Bump Stocks* (Mar. 10, 2018), <https://www.justice.gov/opa/pr/departments-justice-submits-notice-proposed-regulation-banning-bump-stocks> [<https://perma.cc/7TH8-4MTU>].

⁸⁸ Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

⁸⁹ Sophie Tatum & Laura Jarrett, *Pro-Gun Group Challenges Trump Administration Move Banning Bump Stocks*, CNN (Dec. 27, 2018, 10:44 AM), <https://www.cnn.com/2018/12/27/politics/bump-stock-ban-court-challenge/index.html> [<https://perma.cc/878E-FMDH>].

⁹⁰ Bump-Stock-Type Devices, 83 Fed. Reg. at 66,554.

⁹¹ *Id.*

⁹² *Id.* at 66,515.

⁹³ *Id.* at 66,553–54.

⁹⁴ See 18 U.S.C. § 921(a)(23) (2012) (defining machinegun by reference to section 5845(b) of the NFA).

⁹⁵ *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).

Should a Court Afford Any Deference to the ATF's Bump Stock Regulation?

Agencies are generally granted deference when promulgating regulations due to their superior knowledge of the subject matter.⁹⁶ However, the amount of deference a court affords to an agency when it interprets a statute differs according to the facts.⁹⁷ When faced with the matter, a reviewing court will initially determine whether to afford *Chevron* deference to the ATF in its interpretation of the statutory definition of “machinegun.”⁹⁸

Chevron deference affords wide discretion to agencies by courts—an interpretation owed such deference is binding unless it is unreasonable.⁹⁹ This level of deference is generally appropriate “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁰⁰ Because the ATF maintains the authority to make rules carrying the force of law, and the final rule at issue was promulgated in the agency’s exercise of that authority, *Chevron* deference appears appropriate at first glance.¹⁰¹

When applying *Chevron* to an agency statutory interpretation, a court must decide “(1) whether the statute unambiguously forbids the Agency’s interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible.”¹⁰² At step one of the analysis, the evaluating court asks “whether Congress has directly spoken to the precise question at issue.”¹⁰³ “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁰⁴ If the statute is ambiguous, courts proceed to step two, and the question becomes “whether the agency’s answer is based on a permissible construction of the statute.”¹⁰⁵ In ascertaining whether the agency’s interpretation is a permissible construction, a court must look to the structure and language of the statute as a whole.¹⁰⁶

Scholarly debate has surrounded the seemingly subjective application of step one of *Chevron*.¹⁰⁷ Critics maintain that, in many cases, statutory ambiguity is largely

⁹⁶ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

⁹⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 237–38 (2001).

⁹⁸ See *Chevron*, 467 U.S. at 842–43.

⁹⁹ See *id.* at 844.

¹⁰⁰ *Mead*, 533 U.S. at 226–27.

¹⁰¹ 18 U.S.C. § 926(a) (2012) (granting the authority to prescribe “only such rules and regulations as are necessary to carry out provisions of” the GCA); 26 U.S.C. § 7805(a) (2012) (granting the authority to prescribe all “needful rules and regulations for the enforcement of” the NFA); see *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 558 (2012) (noting that *Chevron* deference is generally appropriate when Congress delegated authority to the agency, generally, to make rules carrying the force of law and the agency interpretation was promulgated in the exercise of that authority).

¹⁰² *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

¹⁰³ *Chevron*, 467 U.S. at 842.

¹⁰⁴ *Id.* at 842–43.

¹⁰⁵ *Id.* at 843.

¹⁰⁶ *K. Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

¹⁰⁷ See Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 791–96. (2010).

decided by an indeterminate standard of judicial discretion.¹⁰⁸ Courts have differed in their respective approaches by applying numerous interpretive tools at step one of the analysis, including “legislative history, canons, dictionaries, legislative purpose, and pragmatic judgments.”¹⁰⁹ Arguably, the plain language of 26 U.S.C. § 5845 unambiguously expresses Congress’s intent. Therefore, the ATF should not be afforded any deference to a subsequent interpretation of the statute.¹¹⁰

From a linguistic perspective of the statutory definition of “machinegun,” Congress confined its focus to the regulation of automatic weapons which disburse multiple rounds of ammunition from a *single* trigger function.¹¹¹ A bump stock attachment does not enable continuous firing by a single function of the trigger. When using a bump stock, a separate function of the trigger occurs each time the trigger collides with the shooter’s finger. In other words, each time the weapon fires and recoils, the shooter’s finger is temporarily disengaged from the trigger.¹¹² The weapon only discharges another round when the trigger is subsequently engaged by the shooter’s stabilized finger.¹¹³ Thus, a bump stock attachment merely permits a shooter to engage in a series of rapid individual “pulls” or “functions” of the trigger each time the weapon is fired.¹¹⁴

Another point of contention is the “machinegun” statute’s “automatic” firing requirement.¹¹⁵ It can be conceded that bump stocks permit semi-automatic firearms to “mimic” automatic fire.¹¹⁶ However, a weapon’s rate of fire is not determinative of its status as a “machinegun.”¹¹⁷ Few courts have been tasked with interpreting the term “automatic,” as it relates to the statutory “machinegun” definition. However, the limited number of courts interpreting the statute seem to find little trouble in applying the term “automatic” because the statutory text is clear. The Sixth Circuit, for example, has opined that “[t]he plain language of the statute defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly.”¹¹⁸ The Supreme Court has similarly recognized that a weapon is considered “automatic” when it “fires repeatedly with a single pull of the trigger.”¹¹⁹ That is, “once its trigger is depressed, the weapon will

¹⁰⁸ See, e.g., *id.* at 794 & n.10.

¹⁰⁹ *Id.* at 794–95.

¹¹⁰ See Nat’l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 418 (1992) (noting that “a reviewing court need not accept an interpretation which is unreasonable”).

¹¹¹ 26 U.S.C. § 5845(b) (2012).

¹¹² See Bump-Stock-Type Devices, 83 Fed. Reg. 66,516 (Dec. 26, 2018) (to be codified at 27 C.F.R. pt. 479).

¹¹³ *Id.*

¹¹⁴ *Contra id.* at 66,532.

¹¹⁵ 26 U.S.C. § 5845(b) (2012) (defining “machinegun”); see also *id.* § 5845(a) (including machineguns in the NFA’s definition of a firearm); 18 U.S.C. § 921(a)(23) (2012) (defining machinegun by referencing to the NFA’s definition).

¹¹⁶ Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices, 82 Fed. Reg. 60,930 (proposed Dec. 26, 2017) (to be codified at 27 C.F.R. pts. 478–79).

¹¹⁷ See 26 U.S.C. § 5845(b) (2012).

¹¹⁸ *Akins v. United States*, 312 F. App’x 197, 201 (11th Cir. 2009).

¹¹⁹ *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994) (“As used here, the terms ‘automatic’ and ‘fully automatic’ refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the

automatically continue to fire until its trigger is released or the ammunition is exhausted.”¹²⁰ Finally, the Seventh Circuit has construed the phrase “automatic” to designate “how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism.”¹²¹ The court explained that the “self-acting mechanism” is “set in motion by a single function of the trigger.”¹²²

From the foregoing, it becomes clear that the courts have attempted to describe the term “automatic” with comparable verbosity. For the purpose of the respective courts’ analyses, the term “automatic” specifies the continuous rate of fire that results from a single, uninterrupted depression of the trigger. As mentioned previously, a bump stock does not permit a shooter to completely exhaust the weapon’s ammunition with one “pull” or “function” of the trigger.¹²³ Rather, the trigger must be manually depressed by the shooter’s finger before the weapon can discharge an additional round of ammunition.¹²⁴ By contrast, a conventional “machinegun” maintains the ability to fire multiple rounds in succession as the result of a one-time, continuous trigger pull.¹²⁵ When one asks whether a bump stock is a machinegun, the statute answers with a definitive “no.”

The limited congressional hearings surrounding the promulgation of the NFA are further instructive as to the wholistic meaning of the statutory “machinegun” definition.¹²⁶ Congressional hearings over the NFA took place in April and May of 1934.¹²⁷ The initial proposed “machinegun” definition was analyzed during a hearing of the House of Representatives’ Committee on Ways and Means in a discussion between Congressman Samuel B. Hill and then-president of the NRA, Karl T. Frederick.¹²⁸ The suggested definition was devoid of its current “single function of the trigger” clause, and included language intended to encompass both automatic and semi-automatic weapons designed to shoot “twelve or more shots without reloading.”¹²⁹

ammunition is exhausted. Such weapons are ‘machineguns’ within the meaning of the Act. We use the term ‘semiautomatic’ to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired.”).

¹²⁰ *Id.*

¹²¹ *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009).

¹²² *Id.*

¹²³ See *Method of Shooting a Semi-Automatic Firearm*, U.S. Patent No. 8,127,658 B1 (filed Oct. 26, 2011) (issued Mar. 6, 2012) (explaining that the trigger makes contact with the shooter’s finger and thereby discharges another round).

¹²⁴ *Id.*

¹²⁵ See *Staples*, 511 U.S. at 602 n.1.

¹²⁶ See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005); Slocum, *supra* note 107, at 795.

¹²⁷ See *National Firearms Act of 1934: Hearing on H.R. 9066 Before the H. Comm. on Ways & Means*, 73rd Cong. 4 (1934).

¹²⁸ *Id.* at 40–41.

¹²⁹ *Id.* at 1.

During the hearing, Frederick proffered that:

The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine. Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns.¹³⁰

When pressed by Congressman Hill as to the purpose of the inclusion of the “single function of the trigger” language, Frederick maintained that the single trigger function was “the essence of a machine gun.”¹³¹ If the phrase were not implemented, an “ordinary repeating rifle” could be regarded as a machinegun.¹³²

Following the hearing, Congress revised the definition in apparent agreement with Frederick’s notion and ratified the first federal “machinegun” statute on June 26, 1934.¹³³ The final definition disposed of the “12-shot capacity” language and added the “single function of the trigger” clause.¹³⁴ The statute codified “machinegun” to mean “any weapon which shoots, or is designed to shoot, automatically or semi-automatically, more than one shot, without manual reloading, by a single function of the trigger.”¹³⁵

In 1954, Congress amended the NFA with its promulgation of the Internal Revenue Code.¹³⁶ The Internal Revenue Code, however, retained the original wording of the NFA’s “machinegun” definition.¹³⁷ With the addition of the Gun Control Act of 1968, Congress definitively amended the original NFA definition of “machinegun,” by removing the “semi-automatically” phrase.¹³⁸ Furthermore, the GCA broadened the term “machinegun” to include “the frame or receiver of any such weapon,” “any combination of parts designed and intended for use in converting a weapon into a machinegun,” and “any combination of parts from which a machinegun can be assembled.”¹³⁹ Finally, with the Firearm Owners’ Protection Act of 1986, Congress amended the “machinegun” definition to its current construction by substituting “any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a

¹³⁰ *Id.* at 40.

¹³¹ *Id.* at 41.

¹³² *Id.*

¹³³ See National Firearms Act of 1934, Pub. L. No. 73-474, § 1, 48 Stat. 1236, 1236.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Internal Revenue Code of 1954, Pub. L. No. 83-591, § 5848, 68 Stat. 730 (amending the NFA by defining “rifle,” “shotgun,” and “any other weapon.”)

¹³⁷ Internal Revenue Code of 1954, Pub. L. No. 83-591, § 5848(2), 68 Stat. 726 (defining “machine gun” as “any weapon which shoots, or is designed to shoot, automatically or semi-automatically, more than one shot, without manual reloading, by a single function of the trigger”).

¹³⁸ Compare National Firearms Act of 1934, Pub. L. No. 73-474, § 1, 48 Stat. at 1236 (defining machinegun), with Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1231 (codified at 18 U.S.C. § 921(a)(23) (2012) (amending the NFA definition of machinegun)).

¹³⁹ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1231 (codified at 18 U.S.C. § 921(a)(23) (2012)).

machinegun” for “any combination of parts designed and intended for use in converting a weapon into a machinegun.”¹⁴⁰

Based on the foregoing, the ATF’s unprecedented bump stock regulation contravenes the intent of the legislature. Congress did not intend for semi-automatic weapons to fall within the auspices of the NFA or accompanying machinegun regulations following the Gun Control Act of 1968. By removing the “semi-automatic” language from the statute, Congress recognized that semi-automatic weapons could never fire more than one shot from a single pull of the trigger.¹⁴¹ The record surrounding the NFA conclusively establishes that Congress extensively debated and ultimately recognized that a “single function of the trigger”—coupled with automatic firing—was essential to the makeup of a “machinegun.”¹⁴² If a weapon is deemed capable of firing more than one round from a single trigger pull, the weapon is no longer “semi-automatic.” At that point, the weapon is properly categorized as a “machinegun.”¹⁴³ Accordingly, the addition of a bump stock does not alter a semi-automatic weapon to fire more than one round per trigger pull.¹⁴⁴

With the enactment of the NFA, Congress expressed its resolve to be the sole lexicographer of the term “machinegun” by its pronouncement: “[t]he term ‘machinegun’ means.”¹⁴⁵ Had Congress intended the ATF to promulgate a contrary definition of “machinegun,” a “clarion statement to that effect likely would have been made in the legislation.”¹⁴⁶ Neither the GCA nor the NFA afford such sweeping authority to an administrative agency.¹⁴⁷ “In the context of an unambiguous statute,” a court “need not contemplate deferring to the agency’s interpretation.”¹⁴⁸ Therefore, the ATF should be denied *Chevron* deference at step one of the analysis.¹⁴⁹

Even if a court finds that the statutory “machinegun” definition is ambiguous at step one, *Chevron* deference should nevertheless be denied because the ATF’s construction of the NFA is impermissible as a matter of statutory construction and public policy.¹⁵⁰ Courts take various approaches to step two of the *Chevron* framework. Some courts appear to replicate the analysis at step one by looking to

¹⁴⁰ Firearm Owners’ Protection Act of 1986, Pub. L. No. 99–308, § 109(a), 100 Stat. 449, 460.

¹⁴¹ See Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1213, 1231 (codified at 18 U.S.C. § 921 (2012) (amending the NFA’s definition of machinegun)).

¹⁴² See *National Firearms Act of 1934: Hearing on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 4, 40–41 (1934).

¹⁴³ See 26 U.S.C. § 5845(b) (2012) (defining “machinegun”).

¹⁴⁴ See *Method of Shooting a Semi-Automatic Firearm*, U.S. Patent No. 8,127,658 B1 (filed Oct. 26, 2011) (issued Mar. 6, 2012) (explaining that the trigger makes contact with the shooter’s finger and thereby discharges another round).

¹⁴⁵ 26 U.S.C. § 5845(b) (2012) (emphasis added).

¹⁴⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2796 (2014).

¹⁴⁷ See 18 U.S.C. § 926(a) (2012) (granting the authority to “prescribe only such rules and regulations as are necessary to carry out the provisions of” the GCA); 26 U.S.C. § 7805(a) (2012) (granting the authority to “prescribe all needful rules and regulations for the enforcement of” the NFA).

¹⁴⁸ *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

¹⁴⁹ See 26 U.S.C. § 5845(b) (2012).

¹⁵⁰ See *Chevron*, 467 U.S. at 843–44.

conventional statutory sources including: (1) the terms or sections of the text of the statute, (2) the overall structure of the statute, (3) the legislative history, or (4) the court's understanding of the purpose of the statute.¹⁵¹ Other courts "examine the reasoning process that lead[] to the agency's interpretation."¹⁵² One commentator suggests that the latter methodology is doctrinally analogous to the Administrative Procedure Act's arbitrary and capricious standard of review.¹⁵³ Accordingly, courts ascribing to this approach will likely determine whether the ATF engaged in a "reasoned" decision making process in promulgating the final rule.¹⁵⁴

From a cursory review of the bump stock regulation, it becomes clear that the ATF failed to provide a sound explanation for its policy reversal. A departure from precedent does not necessarily render an agency's interpretation "unreasonable."¹⁵⁵ A sudden ill-conceived retraction, however, certainly negates a finding that the decision making process was "reasoned." In support of its final rule, the ATF dubiously asserts that a semi-automatic weapon can be construed as an illicit machinegun if it "mimic[s] automatic fire."¹⁵⁶ As previously mentioned, the statutory "machinegun" definition makes no mention of the rate at which a weapon fires.¹⁵⁷ Furthermore, the final rule dismisses the ATF's longstanding policy without sound justification by stating that the agency's bump stock classification decisions between 2008 and 2017 "did not reflect the best interpretation of 'machinegun.'"¹⁵⁸

The ATF's proffered explanations for the final rule do not amount to a reasoned legal analysis.¹⁵⁹ Thus, it is difficult to imagine that the ATF's final rule can be justified at either step of the *Chevron* analysis. The agency's decision to regulate bump stocks is commendable in the wake of the Las Vegas attack. A definitive bump stock ban, however, could take years to finalize. Given the willingness of gun rights' advocates to resort to litigation, and the seemingly unsettled application of the *Chevron* analysis, the fate of the ATF's recent "machinegun" rule is entirely unclear.

III. A LEGISLATIVE ALTERNATIVE

In the interim, Congress could definitively regulate bump stocks with an independent act of legislation, while remaining within the permissible bounds of the

¹⁵¹ Slocum, *supra* note 107, at 806.

¹⁵² M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 85, 93 (John F. Duffy & Michael Herz eds., 2005).

¹⁵³ *Id.* at 93–95 (noting that *Chevron* step two reversals are often functionally indistinguishable from reversals predicated on an agency's failure to engage in reasoned decision making).

¹⁵⁴ See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHL.-KENT L. REV. 1253, 1263 (1997).

¹⁵⁵ See *Chevron*, 467 U.S. at 863–64 (noting that an agency must consider varying interpretations and the wisdom of its policy on a continuing basis to engage in informed rulemaking).

¹⁵⁶ Bump-Stock-Type Devices, 83 Fed. Reg. 66,516 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

¹⁵⁷ See 26 U.S.C. § 5845(b) (2012) (defining "machinegun" under the NFA).

¹⁵⁸ Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

¹⁵⁹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 57 (1983).

Constitution. Although the Second Amendment has been interpreted to prevent the government from completely barring law abiding citizens from keeping and bearing arms for self-defense, it is axiomatic that “the right secured by the Second Amendment is not unlimited.”¹⁶⁰ The Supreme Court has noted that the Second Amendment does not protect “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”¹⁶¹ For instance, machinegun ownership restrictions have been challenged since the promulgation of the NFA, and every circuit court to hear the issue has held that the GCA’s machinegun ban does not violate the Second Amendment.¹⁶² In *District of Columbia v. Heller*, the Court held that statutes that encroach on the Second Amendment must be evaluated by some form of heightened scrutiny, as with other fundamental rights.¹⁶³ However, the Court neglected to determine which form of scrutiny courts should apply to gun-regulating legislative regimes.¹⁶⁴

What remains clear is the Court’s approval of the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’” and affirmation that the Second Amendment protects weapons which are “in common use at the time.”¹⁶⁵ Accordingly, Congress maintains a rational basis to regulate bump stocks via statute if such devices are construed as “dangerous and unusual.”¹⁶⁶ Weapons with bump stock attachments are arguably more dangerous in their likely effects and use than commonly owned semi-automatic firearms because of their capability to fire rapidly with the added stability of the shooter’s shoulder. Moreover, it cannot be said that bump stocks are in “common use” by ordinary citizens given their relatively recent rise in popularity. With the wide range of latitude afforded to Congress to tax and regulate commerce, a well-drafted bill aimed at curtailing bump stock ownership could easily pass constitutional scrutiny.¹⁶⁷ Because a court would be more inclined to uphold a legislative measure in this instance, Congress should amend the NFA to include an additional category of “firearms.”¹⁶⁸

¹⁶⁰ *District of Columbia v. Heller*, 554 U.S. 570, 626, 635 (2008) (“[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).

¹⁶¹ *Id.* at 626.

¹⁶² See, e.g., *Hollis v. Lynch*, 827 F.3d 436, 439–40 (5th Cir. 2016); *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136, 138 (3d Cir. 2016); *United States v. Henry*, 688 F.3d 637, 638 (9th Cir. 2012); *Hamblen v. United States*, 591 F.3d 471, 472 (6th Cir. 2009); *United States v. Fincher*, 538 F.3d 868, 870 (8th Cir. 2008).

¹⁶³ *Heller*, 554 U.S. at 628 n.27, 635 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with separate constitutional provisions on irrational laws, and would have no effect.”).

¹⁶⁴ See Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 Md. L. REV. 1131, 1141–42 (2011).

¹⁶⁵ *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

¹⁶⁶ See *id.*

¹⁶⁷ See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 63 (2008).

¹⁶⁸ 26 U.S.C. § 5845(a) (2012) (defining “firearm” under the NFA).

A. A Practical Approach: Adding a New Category of NFA Firearms

Since its initial inception, the NFA has been amended numerous times. Congress first amended the NFA in 1954 with the promulgation of the Internal Revenue Code.¹⁶⁹ Congress again revised the NFA in response to the assassinations of Dr. Martin Luther King, Jr., and Robert F. Kennedy, by enacting Title II of the Gun Control Act of 1968.¹⁷⁰ With the Firearm Owners' Protection Act of 1986, Congress effectively rewrote the NFA and adopted the current statutory definition of "machinegun."¹⁷¹ More recently, Congress amended the NFA with the Homeland Security Act and transferred the ATF from the Department of the Treasury to the Department of Justice.¹⁷²

Because Congress has repeatedly revised the NFA in the wake of an evolving American society, it should not shy away from further pragmatic amendments in order to bring weapons capable of replicating automatic fire within the purview of federal regulation. Rather than attempting to regulate bump stocks under the guise of the "machinegun" statute, Congress should promulgate a new category of NFA "firearms" to include "multiburst trigger activators."¹⁷³

Currently, the NFA regulates categories of "firearms" such as machineguns, short barreled rifles, short barreled shotguns, suppressors, any other weapons, and destructive devices.¹⁷⁴ As mentioned previously, all NFA firearms are controlled during their transfer from one person to another via ATF tax forms regardless of category.¹⁷⁵ If Congress were to create a new category of "firearms" under the NFA to include "multiburst trigger activators," bump stocks would be subject to the same strict requirements that currently apply to machineguns—including registration, taxation, and government approval of ownership. Congress has already expanded the definition of "firearms" under the NFA by adding the category of "destructive devices" to the list in 1968.¹⁷⁶ Therefore, a further addition to the list of categorical "firearms" is not an unprecedented notion.

California recently adopted "multiburst trigger activator[s]" as a category of banned weapons within the territory.¹⁷⁷ The California Penal Code defines "multiburst trigger activator" as "[a] device designed or redesigned to be attached to,

¹⁶⁹ See Internal Revenue Code of 1954, Pub. L. No. 591, §§ 5801, 5802, 5803, 68A Stat. 3, 721–23 (1954) (codified at 26 U.S.C. §§ 5801, 5802, 5803 (2012)).

¹⁷⁰ D'Cruz, *supra* note 25, at 500; see also Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1227 (1968).

¹⁷¹ See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 109(a), 100 Stat. 460 (1986) (codified as amended at 18 U.S.C. § 921(a)(23) (2012)).

¹⁷² See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111, 116 Stat. 2135, 2139 (codified at 6 U.S.C. § 101 (2012)).

¹⁷³ See 26 U.S.C. § 5845(a) (2012) (defining "firearm"); see also *id.* § 5845(b) (2012) (defining "machinegun"); CAL. PENAL CODE § 16930(a) (West 2019) (defining "multiburst trigger activators").

¹⁷⁴ 26 U.S.C. § 5845(a) (2012).

¹⁷⁵ See *id.* § 5811.

¹⁷⁶ See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1231 (1968) (codified at 18 U.S.C. § 921 (2012)).

¹⁷⁷ See CAL. PENAL CODE § 16930 (West 2019).

built into, or used in conjunction with, a semiautomatic firearm, which allows the firearm to discharge two or more shots in a burst by activating the device.”¹⁷⁸ The definition further includes bump stocks and other devices that move “the firearm in a back-and-forth motion” thereby “facilitating the rapid reset and activation of the trigger by a stationary finger.”¹⁷⁹ If Congress adopted an NFA category under “firearms” similar to California’s iteration of “multiburst trigger activator” devices, the ATF would maintain explicit authority to regulate bump stocks and other devices intended to replicate automatic fire in semi-automatic weapons.

B. Why Amending the NFA Matters: Promoting Uniform Firearms Classifications

Congress should adopt a new category of “firearms” under the NFA because consistent application of the “machinegun” definition has been largely unattainable in the wake of innovative weapons.¹⁸⁰ Regulatory gaps ultimately exist because the current federal firearms laws are aimed at regulating “machineguns” as they were understood in the mid-1980s. In the current state of political polarization, Congress has shied away from amending the NFA despite the repeated attempts by manufacturers to lawfully circumvent the federal firearms statutes. Modern firearm modifications can effectively enable a shooter to fire a weapon at the same rate as a conventional machinegun without turning the weapon into a regulated “machinegun.” As demonstrated by the Las Vegas attack, the rapid fire enabled by these aftermarket devices poses a serious threat to public safety. The current federal machinegun definition and the ATF’s recent final rule make no mention of the rate in which a weapon fires.¹⁸¹ Thus, the ATF remains constrained by an outdated statutory regime regardless of the ultimate fate of bump stock regulation.

Recent ATF rulings illustrate the risk associated with continued legislative inaction. In a 2004 letter to a private citizen, the ATF classified a small section of string attached to a semi-automatic weapon as a “machinegun.”¹⁸² The letter noted that the string was “intended for use as a means for increasing the cycling rate of a semiautomatic weapon.”¹⁸³ Fortunately, the ATF subsequently retracted its colloquial “shoe string machinegun” classification by determining that “the string by itself is not a machinegun.”¹⁸⁴ Rather, “when the string is added to a semiautomatic

¹⁷⁸ *Id.* § 16930(a)(1).

¹⁷⁹ *Id.* § 16930(b)(1).

¹⁸⁰ See 26 U.S.C. § 5845(a) (2012) (defining “firearm” under the NFA).

¹⁸¹ See *id.* at 5845(b); Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

¹⁸² Letter from Sterling Nixon, Chief, Firearms Technology Branch, ATF, to Brian A. Blakely (Sept. 30, 2004), <http://www.nfaa.org/documents/2004-09-30%20String%20Trick%20-%20ATF%20FTB%20Reiterates%201996%20Position.pdf> [https://perma.cc/2K6Y-8VHH].

¹⁸³ *Id.*

¹⁸⁴ Letter from Richard Vasquez, Acting Chief, Firearms Technology Branch, ATF, to Brian A. Blakely (June 25, 2007), <http://www.nfaa.org/documents/2007-06-25%20String%20Trick%20-%20ATF%20FTB%20Overrules%20Itself.pdf> [https://perma.cc/22Q7-7C94].

firearm . . . the result is a firearm that fires automatically and consequently would be classified as a machinegun.”¹⁸⁵

The ATF similarly blundered in its initial classification of the “Akins Accelerator” in 2003.¹⁸⁶ At issue was a device intended to increase the cyclic rate at which the trigger of a semi-automatic weapon could be actuated to discharge the weapon.¹⁸⁷ Unlike conventional bump stocks, the Akins accelerator used an internal spring to manipulate the weapon’s recoil so that a shooter could engage the trigger once and initiate an automatic firing sequence without releasing the shooter’s finger.¹⁸⁸ Upon initial review, the ATF ruled that the device was not a “machinegun.”¹⁸⁹ More than three years after issuing its initial classification, however, the ATF ruled that the device was a “machinegun” under the NFA and GCA.¹⁹⁰ As such, the ATF required the manufacturer to remove the certain parts from the device and surrender them to the agency.¹⁹¹ The manufacturer of the device sued the ATF for its subsequent reversal.¹⁹²

Another convoluted interpretation of the federal “machinegun” statute stems from the ATF’s AutoGlove classification in 2017.¹⁹³ The AutoGlove was designed as a “trigger activation device,” which was free from permanent attachment to a firearm.¹⁹⁴ In essence, the device was a battery-operated glove that allowed the shooter to manipulate the trigger at variable speeds by holding the index finger on the weapon’s trigger while simultaneously pressing a button attached to the glove with the shooter’s thumb.¹⁹⁵ When the shooter pressed the button (known as the “activator plunger”), a motor attached to the index finger instantaneously made contact with the weapon’s trigger and then released.¹⁹⁶ The action simulated multiple pulls of the trigger and allowed the firearm to cycle and fire “at a rate of up to 1,000 rounds per minute.”¹⁹⁷

¹⁸⁵ *Id.*

¹⁸⁶ *See Akins v. United States*, 82 Fed. Cl. 619, 620–21 (2008).

¹⁸⁷ *Id.* at 621.

¹⁸⁸ *Method of Shooting a Semi-Automatic Firearm*, U.S. Patent No. 8,127,658 B1 (filed Oct. 26, 2011) (issued Mar. 6, 2012).

¹⁸⁹ *See Akins*, 82 Fed. Cl. at 621.

¹⁹⁰ ATF Rul. 2006-2 (Dec. 13, 2006), <https://www.atf.gov/firearms/docs/ruling/2006-2-classification-devices-exclusively-designed-increase-rate-fire/download> [https://perma.cc/P28L-3YLT]; *see also Akins*, 82 Fed. Cl. at 621.

¹⁹¹ *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,517 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

¹⁹² *Id.*

¹⁹³ Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, ATF, to AutoGlove USA, LLC (Sept. 11, 2017), <https://lawcenter.giffords.org/wp-content/uploads/2018/01/atf-autoglove-determination-9-11-2017-redacted.pdf> [https://perma.cc/GBK5-3E8Q].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Rhett Jones, *This Trigger-Happy Glove Lets You Simulate Machine Gun Fire, But How Is It Legal?*, GIZMODO (Aug. 2, 2017, 4:40 PM), <https://gizmodo.com/this-trigger-happy-glove-lets-you-simulate-machine-gun-1797434487> [https://perma.cc/L8XV-WB97].

The ATF categorized the AutoGlove device as a “combination of parts designed and intended for use in converting a weapon into a machinegun.”¹⁹⁸ The agency reasoned that because the device used the activator plunger to activate the drive motor and thereby initiate the firing sequence, the button could be likened to the weapon’s “trigger.”¹⁹⁹ With the shooter’s use of the AutoGlove, the weapon fired more than one round per press of the activator plunger.²⁰⁰ Thus, according to the agency, the AutoGlove device converted a lawful semi-automatic weapon into an illicit “machinegun.”²⁰¹

The most perplexing interpretation of the NFA machinegun definition stems from a letter ruling regarding the original rapid-firing “Gatling Gun.”²⁰² As a forerunner of contemporary fully automatic machineguns, the Gatling Gun is able to fire multiple shots in succession using a hand-powered crank and a number of different barrels.²⁰³ In its original ruling in 1955, the Internal Revenue Service held that the Gatling Gun was not designed to shoot automatically more than one shot with a single function of the trigger.²⁰⁴ In recent years, the ATF affirmed the IRS’s initial ruling and noted that “[t]he rate of fire is regulated by the rapidity of the hand-cranking movement, manually controlled by the operator.”²⁰⁵ According to the ATF, the Gatling Gun is not a machinegun “because it is not a weapon that fires automatically.”²⁰⁶ As such, traditional Gatling Guns are currently outside of the scope of the NFA.

From the foregoing discussion, it is readily apparent that the ATF has had a difficult time classifying innovative weapons under the National Firearms Act. Arguably, the problem does not lie with the text or interpretation of the NFA’s “machinegun” definition. Sophisticated firearms manufacturers are well aware of the current firearms laws and increasingly push the boundaries of the NFA with innovative devices.²⁰⁷ As such, many dangerous weapons currently on the market are developed with the intent to evade NFA “firearm” categorization. If Congress were to promulgate a new category of firearms to include “multiburst trigger activating devices,”²⁰⁸ the ATF would have an easier time regulating semi-automatic weapons which have been manipulated to fire at a high rate, but do not fit squarely within the statutory machinegun definition. Rather than focusing on how the weapon fires once the trigger is pulled, the new category of NFA firearms would place weapons

¹⁹⁸ Letter from Michael R. Curtis to AutoGlove, *supra* note 193.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See ATF Rul. 2004-5 (Aug. 18, 2004), <https://www.atf.gov/file/83561/download> [<http://perma.cc/K6DH-D9VS>].

²⁰³ See *id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See Nick Penzenstadler, *Hundreds of Gun Add-ons Testing Limits of ATF Review*, USA TODAY, (Oct. 6, 2017, 6:55 PM), <https://www.usatoday.com/story/news/2017/10/06/bump-stocks-and-other-gun-add-ons-testing-limits-atf/740431001/> [<http://perma.cc/F5E7-FG9E>].

²⁰⁸ See CAL. PENAL CODE § 16930 (West 2019) (defining “multiburst trigger activator”).

intended to fire at similar rates as machineguns within the sphere of lawful regulation.

CONCLUSION

Admittedly, the gun control debate at large cannot be adequately addressed by a single congressional measure or agency action. It should be further acknowledged that federal regulation of weapons intended to replicate automatic fire cannot prevent every firearm-related crime from occurring. The Second Amendment ensures that the fundamental right to bear arms cannot and should not be infringed with an outright ban of all firearms.²⁰⁹ However, Congress and the courts have recognized that some weapons are more dangerous in the hands of an individual than others and are thus subject to more stringent government regulation. Ostensibly, bump stocks are such weapons. If lawmakers are serious about imposing NFA restrictions on bump stocks, a statutory regime regulating the manufacture, sale, and ownership of “trigger activating devices” is the logical first step.

If Congress were to adopt a new category of NFA firearms to include “multiburst trigger activating devices,” the weapons would need to be registered in the National Firearms Registration and Transfer Record, which is maintained by the Attorney General.²¹⁰ The making or transfer of a “trigger activating device” would require payment of a \$200 tax, submission of fingerprints and other information, and ultimate approval by ATF.²¹¹ Furthermore, creating a new category of NFA devices would encourage uniform ATF classifications in contemporary cases where the weapons at issue do not fit within the bounds of the current NFA firearms categories.

²⁰⁹ See U.S. CONST. amend. II (“[T]he right of the people to keep and bear Arms, shall not be infringed.”).

²¹⁰ See 26 U.S.C. § 5841(a) (2012).

²¹¹ *Id.* §§ 5811(a), 5812(a), 5821(a), 5822.